

**UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY**

In the Matter of:

SAUL ORTEGA,
Former Chief Financial Officer, Director,
President, Chief Executive Officer, and
Chairman of the Board,

And

DAVID ROGERS, JR.,
Former Chairman of the Board

First National Bank
Edinburg, Texas

Docket Nos.:

AA-EC-2017-44

AA-EC-2017-45

**ORDER DENYING RESPONDENTS' MOTION FOR
SUMMARY DISPOSITION ON THE APPOINTMENTS CLAUSE**

On August 21, 2018, the Comptroller of the Currency (“Comptroller”), as chief officer of the Office of the Comptroller of the Currency (“OCC”), issued an Order in Pending Enforcement Cases in Response to *Lucia v. SEC*,¹ reassigning Administrative Law Judge (“ALJ”) C. Richard Miserendino to this matter.

This matter was then assigned to the undersigned on January 6, 2020 by Order of the Comptroller following ALJ Miserendino’s retirement. On January 8, 2020, the undersigned issued a “Notice of Reassignment and Order Regarding the Comptroller of the Currency’s Order in Pending Enforcement Cases,” which directed the parties to file any objections they may have to the undersigned’s assignment to this case, or to any of the previous actions taken by the prior ALJs,

¹ *Lucia v. SEC*, 585 U.S. ___, 138 S.Ct. 2044, 201 L.Ed.2d 464, 2018 LEXIS 3836, 2018 WL 3057893 (2018) (“*Lucia*”).

by February 28, 2020. On February 28, 2020, Saul Ortega (“Ortega”) and David Rogers, Jr. (“Rogers”) (collectively “Respondents”) filed a “Motion for Summary Disposition on the Appointments Clause and Objections to Orders Issued by ALJ”² (“Motion”). On March 13, 2020, Enforcement Counsel for the OCC (“Enforcement Counsel”) filed an Opposition to the Motion (“Response”).

Respondents assert that the prior ALJs—namely, C. Richard Miserendino and Christopher B. McNeil³—were not authorized to preside over this matter because they were not appointed in accordance with the Appointments Clause of the United States Constitution.⁴ Respondents assert that because the prior ALJs were unconstitutionally appointed, the matter must be dismissed and that the OCC start a new proceeding before a “proper ALJ.”⁵ Furthermore, Respondents object to the undersigned’s appointment because Respondents do not have any documents from the OCC establishing that the undersigned’s appointment was consistent with the Appointments Clause and therefore request discovery.⁶

Enforcement Counsel opposes the Motion on the grounds that the undersigned has been constitutionally appointed, based on the exhibits attached to its Statement of Additional Material Facts and based on information that is publicly available on the Internet. According to Enforcement Counsel, the assignment of this pending case to a new ALJ comports with the remedy required by *Lucia*—specifically, a new hearing before a properly appointed ALJ.⁷ Enforcement Counsel also asserts that no additional discovery is required because there is now sufficient information in the record to establish that the undersigned was constitutionally appointed.⁸ According to

² Respondent’s objections to the orders issued by the prior ALJs are addressed in a separate order.

³ ALJ McNeil was initially assigned to the case prior to ALJ Miserendino’s reassignment following *Lucia*.

⁴ Motion at 1, citing *Lucia*.

⁵ *Id.* at 2.

⁶ *Id.* at 3.

⁷ Response at 9, citing *Lucia*, 138 S.Ct. at 2055.

⁸ Response at 2, 9, 11.

Enforcement Counsel, this is the third time the parties have briefed the constitutionality of the OCC's ALJs, and further delay, including Respondents' preemptive motion for interlocutory appeal to the Comptroller, is unwarranted.⁹ The undersigned agrees with Enforcement Counsel.

Respondents' Motion is founded on the following premises: first, that the ALJs to whom this matter was originally assigned had not been constitutionally appointed at the time of assignment; and second, that the appropriate remedy for a proceeding tainted with an Appointments Clause violation would be voiding and refile of the Notice of Charges and the institution of an entirely fresh enforcement action before a properly appointed ALJ.¹⁰ Even presuming that Office of Financial Institution Adjudication ("OFIA") ALJs who preside over OCC enforcement actions are sufficiently similarly situated to the ALJs at issue in *Lucia* as to be subject to the same constraints on the manner of their appointment, a question which has not been determined by the Comptroller and which is not for this tribunal to decide,¹¹ Respondents' conclusion regarding the appropriate remedy for an Appointments Clause violation here does not follow from that premise under logic or the law.

Contrary to Respondents' contention, there is no relationship between the validity of the Notice of Charges filed against Respondents and the question of whether the ALJ assigned to preside over the subsequent enforcement proceedings was properly appointed. Nothing in the operative statutes requires that an OCC enforcement action, once initiated, be adjudicated by an

⁹ *Id.* at 1, 4-5.

¹⁰ See Motion at 1 ("[T]his proceeding is a nullity, void, and must be dismissed in its entirety.").

¹¹ In an interlocutory decision in a Federal Deposit Insurance Corporation ("FDIC") case issued prior to *Lucia*, the Fifth Circuit concluded that OFIA ALJs likely were "inferior Officers" within the meaning of the Appointments Clause, but did not have occasion to rule upon the constitutionality of their prior method of appointment. *Burgess v. FDIC*, 871 F.3d 297, 301-04 (5th Cir. 2017); *contra Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000) (holding that OFIA ALJs are not inferior Officers). To the undersigned's knowledge, the question has not been addressed by any court since *Lucia* was decided.

ALJ, as opposed to the Comptroller or other agency official.¹² The OCC’s Uniform Rules and Regulations expressly provide that “[t]he Comptroller may, at any time during the pendency of a proceeding, perform . . . any act which could be done or ordered by the administrative law judge.”¹³ Such a result upon remand—rehearing by the agency rather than an ALJ—also was contemplated by the *Lucia* Court.¹⁴ Put plainly, the OCC is entitled to bring an enforcement action even if there is no ALJ available to hear the action at all. It therefore follows that the presence or absence of a validly appointed ALJ at the commencement of an enforcement action has no bearing on the underlying legitimacy of the action itself.

Moreover, *Lucia* makes it clear that the “appropriate remedy” for an Appointments Clause violation of the kind alleged here is not dismissal of the action and refile of the Notice of Charges, but simply “a new hearing before a properly appointed official” in the extant action.¹⁵ The remedial analysis in *Lucia* centered on whether the previous ALJ could continue to hear the case upon remand if he were to be constitutionally appointed in the interim; it concluded he could not.¹⁶ At no point did the Court appear to entertain the possibility that the action itself was invalid and should be brought from scratch, or that respondents before an unconstitutionally appointed tribunal are entitled to have the proceedings dismissed in full.¹⁷ Rather, the *Lucia* Court took for granted that the existing case would be remanded and that proceedings would continue, albeit upon assignment to a different ALJ or before the agency itself.¹⁸ So too, here, is it both unnecessary and

¹² See 5 U.S.C. §§ 554(a), 556(b) (providing that “the agency,” “one or more members of the body which comprises the agency,” or “one or more administrative law judges” “shall preside at the taking of evidence” in adjudicatory proceeding); 12 U.S.C. § 1818(e), (i).

¹³ 12 C.F.R. § 19.4; see also *id.* § 19.101 (requiring enforcement proceedings to be conducted by OFIA ALJs “[u]nless otherwise ordered by the Comptroller”).

¹⁴ See *Lucia*, 138 S.Ct. at 2055 n.6 (noting that “[t]he SEC may decide to conduct *Lucia*’s rehearing itself”).

¹⁵ *Id.* at 2055 (internal quotation marks and citation omitted).

¹⁶ See *id.* n.5.

¹⁷ See *id.* (“To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which *Lucia* is entitled.”).

¹⁸ See *id.* n.6.

inappropriate for the OCC to void the entire action and start again in order to correct whatever Appointments Clause deficiencies may have existed previously; it is enough for the case to be heard anew by an ALJ who has been properly appointed.

As for Respondents' request for a brief discovery period regarding the undersigned's appointment, the undersigned finds that such additional discovery is unnecessary based on Enforcement Counsel's Statement of Additional Material Facts and the exhibits referenced therein. Accordingly, Respondents' request for discovery on this issue is hereby denied. The undersigned's ruling does not affect any request by Respondents for information under the Freedom of Information Act ("FOIA") (see Response at 5-6 noting Respondents' January 14, 2020 FOIA request to the Treasury Department), as such requests are administered by the agency itself independent of this enforcement action.

In sum, the undersigned finds that any potential Appointments Clause issue does not warrant any further delay in this matter, and Respondents' Motion for Summary Disposition on the Appointment Clause is hereby denied. Furthermore, Respondents offer no reason to conclude that the undersigned even has the jurisdiction in the first instance to decide arguments regarding the constitutionality of the appointment of ALJs, and those arguments are accordingly preserved for appeal. As such, the case will proceed with the undersigned as the assigned ALJ.

To the extent that Respondents' current Motion is duplicative of prior motions that the parties have asserted are still pending—specifically, 1) Respondents' Motion for Summary Disposition on Appointments Cause and Brief in Support, filed on August 30, 2018; and 2) the portion of Respondents' objections to orders issued by prior ALJs that addresses the Appointments Clause issue, filed on October 5, 2018—those motions are hereby denied as moot. Furthermore, Enforcement Counsel's Motion to Strike Respondents' Eighth Affirmative Defense, which also

addresses the Appointments Clause issue, filed on August 31, 2018, is hereby granted.

SO ORDERED.

Issued: March 17, 2020

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication